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MAY - 3 1993

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May 3, 1993

BY HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

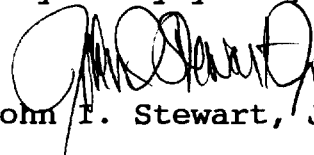
Re: WBNS TV Inc. Petition for Reconsideration
of Redesignation of Columbus, Ohio
Television Market / MM Docket Nos. 92-259,
90-4, and 92-295, RM-8016

Dear Ms. Searcy:

Enclosed for filing on behalf of WBNS TV Inc. are an original and eleven (11) copies of a Petition for Reconsideration of the Commission Order modifying the Columbus, Ohio television market to include Chillicothe, Ohio in a hyphenated market designation. This modification was ordered pursuant to the Commission's Report and Order In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, in the above referenced dockets.

If there are any questions concerning this matter, please contact the undersigned.

Very truly yours,


John I. Stewart, Jr.

Enclosures

cc: Roy F. Perkins, Esq., Triplett & Associates, Inc.
Alexandra Wilson, Esq.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
Implementation of the Cable Television)	
Consumer Protection and Competition)	MM Docket No. 92-259
Act of 1992)	
Broadcast Signal Carriage Issues)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
Request by TV 14, Inc.)	
to Amend Section 76.51 of the)	MM Docket No. 92-295
Commission's Rules to Include)	RM-8016
Rome, Georgia, in the Atlanta,)	
Georgia, Television Market)	

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Rule 1.429 of the Commission's Rules, WBNS TV

I. THE COMMISSION FAILED TO PROVIDE ADEQUATE NOTICE AND OPPORTUNITY FOR COMMENT ON THE CHANGE IT ADOPTED, AND FAILED TO ARTICULATE REASONS FOR THE CHANGE.

In its Report and Order, the Commission modified the Columbus, Ohio market designation and two others. Report and Order ¶ 49. Prior to doing so, the Commission had never published any notice that it intended to change the Columbus designation. The Commission did not receive comments on the Columbus change from any party other than its proponent, which merely resubmitted an updated version of a Petition for Rulemaking it had filed in 1988, on which the Commission has never acted and which has itself never been placed on public notice. In ordering the market modifications, the Commission explained itself only by stating that the changes were "warranted" by evidence provided by the commenting parties. Id.

In the Notice of Proposed Rule Making preceding the Report

The Commission has repeatedly recognized that modifications to Section 76.51 may only be made pursuant to notice and comment rulemaking proceedings. For example, in the Report and Order, the Commission expressly reconfirmed the procedure to be followed in handling requests for market modifications:

We expect that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals. Interested parties will then have a full opportunity to participate in the proceeding and to react to the proposal.

Report and Order ¶ 49, n. 150.

Moreover, previous modifications to Section 76.51 were made only after the Commission issued specific notice and received comments. In the Matter of Amendment of § 76.51, Major Television Markets (Orlando-Daytona Beach, Melbourne, and Cocoa, Florida), 57 R.R. 2d Cases 685 (1984); In the Matter of Amendment of § 76.51, Major Television Markets (Fresno-Visalia, California), 57 R.R.2d Cases 1122 (1985). In the latter case, the Commission dismissed a challenge to the adequacy of notice raised by an interested party, not on the ground that public notice was unnecessary, but because proper notices had been issued and specifically incorporated into the rulemaking proceeding, the express purpose of which was to

~~consider specified additions to the market~~

petition, issue notice of its filing or seek comment on the specific proposal to modify the Columbus market. Nor was the pendency of the petition disclosed or referred to in the Notice by which this proceeding was commenced. Thus, interested parties were effectively foreclosed from submitting comments or otherwise participating in the decisionmaking process.^{2/}

Indeed, the Commission virtually concedes the impropriety of its ex parte modification of the Columbus market designation in explaining its rejection of a separate proposal to add Athens to the Atlanta market designation. Report and Order n. 149. There, the Commission added Rome to the market designation, based on the comments of interested parties received in a separately docketed rulemaking proceeding, which it consolidated with this proceeding. But the Commission expressly declined to add Athens to the market designation at the request of one of the commenters in that proceeding, on the ground that the original notice specified only Rome, and adding Athens could be accomplished only after issuance of a new rulemaking proposal. Id.

It is a basic requirement of administrative rulemaking that substantive changes in agency rules may not be adopted without public notice that allows comment on the specific proposed rule. Reeder v. Federal Communications Com'n, 865 F.2d 1298, 1304-05 (D.C.Cir. 1989). It is equally clear that an agency may not

^{2/} Triplett & Associates refiled its 1988 Petition for Rulemaking as its Comments in this proceeding. It did not serve its Comments on any interested parties. The Commission did not disclose that it was considering any change to the Columbus market until it summarily announced that it had already granted Triplett's request.

establish a rule that departs from its original proposal merely because an interested party suggests such a change. For a new rule to be valid, all interested parties must have been alerted by the notice to the changes ultimately adopted. Chocolate Manufacturer's Ass'n of United States, 755 F.2d 1098 (4th Cir. 1985).

Here, only Triplett & Associates, Inc., the petitioning party, had notice of its proposed modification to the Columbus market designation. All other interested parties were effectively deprived of any voice on the proposal. The Notice did not alert interested parties to the possibility that this modification would be made without specific public notice. Indeed, the Commission proposed to consider interim ad hoc revisions to Section 76.51 through "individual rulemaking notices." Notice ¶ 22, n. 27.

Another basic precept of administrative law is that the Commission must engage in reasoned decision-making, articulating clearly the reasons for its decision and enumerating the particular facts relied upon. Committee for Community Access v. FCC, 737 F.2d 74, 77 (D.C. Cir. 1984). The Commission may not simply modify its rules without indicating why the change was necessary or justified. Id.

The Commission explained its modification of the Columbus market only by stating that the modification, together with two others, was made in response to requests "by parties providing specific evidence that change to a particular market is warranted." Report and Order at ¶ 49. Beyond this general statement, which applied to three separate actions, the Commission

articulated no basis whatever for its decision to modify the Columbus market. No grounds or factual circumstances were specified. Thus, even if the modification were not a fait accompli, precluding comment or opposition, the Commission failed to state factual or policy grounds upon which it was based.

II. IF PROPER NOTICE AND COMMENT PROCEDURES ARE FOLLOWED, INTERESTED PARTIES WILL PROVIDE EVIDENCE THAT CHILLICOTHE SHOULD NOT BE INCLUDED WITHIN THE COLUMBUS MARKET

WBNS-TV believes that the Commission would not have modified the Columbus market designation as it did if it had first solicited and received comments from other interested parties. If the Commission rescinds its ex parte decision and proceeds instead after publishing specific notice of the proposed change, interested parties will provide evidence that Chillicothe lacks the "commonality" with the market as a whole that the Commission says is necessary to support an amendment of Section 76.51. See Report and Order at ¶ 49.

The evidence would demonstrate that Chillicothe is not properly considered part of the Columbus market. It is a separate market in all important respects, in terms of both its independent identity as a community and the separate and independent way in which the Chillicothe station operates in the television advertising marketplace. Indeed, Arbitron designates Chillicothe not as part of a hyphenated market but as an independent one-county "non-ADI market" within the Columbus ADI. These and other facts will be presented for the Commission's full consideration if it rescinds the ex parte market designation change it has

summarily announced in the Report and Order and follows proper notice and comment procedures instead.

CONCLUSION

The Commission's amendment of Section 76.51 of its Rules to add Chillicothe to the Columbus market designation was adopted without the required notice and comment and without a sufficient